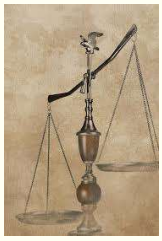
2020 CRIMINAL YEAR IN REVIEW

Criminal Rules Update

Presented by APAAC and CLE West



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State v. Champagne, 247 Ariz. 116 (2019)

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State v. Champagne

Background

- Capital case
- Champagne killed two people in his apartment. He buried them in a wooden box in his mother's back yard, where a landscaper discovered them almost two years later.

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State v. Champagne

- ARCrP 6.2(b): "In all capital trial proceedings where the defendant is indigent, the presiding judge must appoint two attorneys—lead counsel and co-counsel—under Rule 6.8(b)."
- 6th Amendment: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

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State v. Champagne—general legal principles

A defendant is:

- not entitled to an attorney of his or her choice
- not entitled to a meaningful relationship with his or her attorney
- deprived of the right to counsel only where an irreconcilable conflict exists or the relationship with the attorney is completely fractured

The trial court must investigate the basis of a defendant's motion to change counsel.

The court's failure to adequately investigate an alleged conflict may result in reversable error.

The scope of the investigation depends on the defendant's allegations.

- hearing may be required

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State v. Champagne

Pro per motion to change counsel

- gave no real basis to change counsel
- nonetheless, lead counsel said that a *bona fide* conflict of interest existed
- trial court: counsel can file written motion
- none filed

Follow-up *pro per* "motion"

- lead counsel opposed this motion
  - not in Champagne's best interests
  - relationship not irretrievably broken
  - can work together to prepare for trial

Trial court denied motion.

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LaGrand factors

- "whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict"
- "inconvenience to witnesses"
- "the quality of counsel"
- "the timing of the motion"
- "the time period already elapsed between the alleged offense and trial"
- "the proclivity of the defendant to change counsel"

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State v. Johnson,
247 Ariz. 166 (2019)

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State v. Johnson—background

- Also a capital case.
- The murder actually happened 10 years ago. It involved a brutal stabbing in a Mesa massage parlor.

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State v. Johnson

- ARCrP 6.2(b): "In all capital trial proceedings where the defendant is indigent, the presiding judge must appoint two attorneys—lead counsel and co-counsel—under Rule 6.8(b)."
- 6th Amendment: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

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State v. Johnson

General legal principles

- Where an irreconcilable conflict or a completely fractured relationship exists between counsel and the accused, new counsel must ordinarily be appointed.
- But new counsel need not necessarily be appointed where "single allegation[s] of lost confidence," "disagreements over defense strategies," or less serious conflicts arose.
- Defendants bear the burden of proving that a condition warranting the appointment of new counsel exists.

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State v. Johnson

2015 motion to change counsel (before trial)

- had asked for but not seen all motions filed on his behalf
- hadn't seen the most recent plea proposal, which included things he objected to
- his attorneys weren't filing motions that were being filed by other attorneys in other capital cases
- he hadn't been give copies of his mental-health records

2016 motion to change counsel (penalty phase)

- his attorneys weren't asking the questions he wanted
- they didn't impeach a witness like he wanted
- they were overly concerned about the identity and presence at trial of one of his friends

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State v. Duffy, 247 Ariz. 537 (App. 2019)

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State v. Duffy

Background

Right to counsel case where the issue was whether the trial court should have allowed the same retained attorney to represent each defendant (Duffy & girlfriend)

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State v. Duffy

- ARCrP 6.1(a): "A defendant has the right to be represented by counsel in any criminal proceeding. . . ."
- 6th Amendment: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."
- Alleged violation of 6th Amendment is subject to *de novo* review.

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State v. Duffy

- The State contended that any claim should have been handled in a PCR Petition, as this was essentially a claim for ineffective assistance of counsel.
- The Court acknowledged this standard is correct if the only complaint is about the attorney and any decisions at trial that may have rendered counsel ineffective. These types of claims must be brought under ARCrP 32/33 and not addressed on appeal.
- The Court that Duffy was not precluded from challenging on direct appeal the trial court's failure to discharge its duty to protect Duffy's right to conflict-free counsel.
- The Court found that the trial court erred because it was alerted to the potential conflict between Duffy and Matias but failed to adequately inquire into the propriety of joint representation or the validity of Duffy's purported waiver of the conflict.

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State v. Kaipio (*Espinoza-Sanudo, RPI*), 246 Ariz. 134 (App. 2019)

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State v. Kaipio

A case regarding release conditions and the sovereign powers of different courts to enforce laws and the priority of sovereigns to enforce those laws or rules.

This case turns on the legal significance of a writ from one court which stems from a longstanding practice permitting both sovereigns to enforce and vindicate their respective charges against a defendant.

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State v. Kaipio—general legal principles

Each sovereign has its own system of courts to declare and enforce its laws, and it is imperative that each system remains effective and unhindered it its vindication of its laws.

It is well established that the first sovereign to arrest a defendant has priority of jurisdiction for trial, sentencing and incarceration, and must be permitted to exhaust its remedy . . . before the other sovereign shall attempt to take the defendant for its purpose.

The first sovereign will lose priority if:

- it dismisses the charges;
- grants bail or parole; or
- the defendant's sentence expires.

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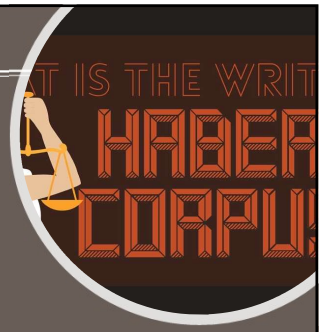
- Priority is not relinquished however, through consent to a defendant's temporary transfer via a writ of habeas corpus which is a common law writ issued when it is necessary to remove a prisoner in order to prosecute in the proper jurisdiction where the crime was committed.
- The writ is the equivalent of a request for temporary physical custody.



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State v. Murray (Easton),
247 Ariz. 447 (App. 2019)

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State v. Murray (*Easton*)—background

- Two brothers asked the victim to store some marijuana for them.
- When he refused, an argument and then a fight broke out.
- Easton Murray tased the victim and urged his brother in Jamaican Patois to "shoot him, shoot the boy."
- His brother shot the victim in the leg with a rifle.
- Both brothers were charged with aggravated assault with a deadly weapon, tried jointly, and convicted.

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State v. Murray (*Easton*)

ARCrP 13.5 Amending Charges; Defects in the Charging Document—Altering Charges; Amending to Conform to the Evidence.

- "A preliminary hearing or grand jury indictment limits the trial to the specific charge or charges stated in the magistrate's order or the grand jury indictment.
- "Unless the defendant consents, a charge may be amended only to correct mistakes of fact or remedy formal or technical defects.
- "The charging document is deemed amended to conform to the evidence admitted during any court proceeding . . ."

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State v. Murray (*Easton*)

Murray	Court of Appeals
▪ alleged that indictment charged him with committing agg. assault with a firearm	▪ indictment referenced a firearm, not a taser
▪ but the state presented evidence and argued that he used a taser	▪ state introduced evidence of taser to explain altercation as a whole
▪ these are separate offenses	▪ prosecutor didn't argue that taser was a deadly weapon or dangerous instrument
▪ was convicted of an offense for which he had not been given notice	▪ prosecutor urged the jury to convict Murray based on use of firearm

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R.S. v. Thompson,
247 Ariz. 575 (App. 2019)

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R.S. v. Thompson

Case about A.R.S. 13-4062(4), Physician-Patient Privilege.

Should a defendant be able to receive and utilize privileged records just because the information received may be helpful to the defendant's case?

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R.S. v. Thompson

- Victim's Privilege vs. Defendant's Constitutional Rights?
- Which prevails?
- Constitutional rights.

The Court acknowledges this is true:

- a privilege cannot withstand a direct conflict with a constitutional right
- a defendant's due process right to a fair trial does not create a right to discovery any greater than those rights created by ARCrP 15.1 or *Brady v. Maryland*, 373 U.S. 83.

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R.S. v. Thompson

Can a defendant overcome the privilege? Yes.

1) The defendant must show a substantial probability that the information sought is fundamental to an element of the state's charges against him or his justification defense.

2) The defendant must further demonstrate that there is no alternative evidence, and that further prejudice would occur due to the unavailability of the records.

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State v. Johnson, 247 Ariz. 166 (2019)

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State v. Johnson—background

- Capital case.
- Murder by brutal stabbing in a massage parlor.

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State v. Johnson

Compelled releases

ARCrP 15.2(g): The Defendant's Disclosures—Disclosure by Court Order

- The court may order any person to provide material or information to the state if:
  - the state has a substantial need for the material or information;
  - the state can't obtain the substantial equivalent without undue hardship; and
  - disclosure doesn't violate the defendant's constitutional rights.

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State v. Johnson

Compelled releases

The state requested some of the defendant's records.

The state couldn't obtain them alone.

Johnson objected to being compelled to sign.

The trial court ordered Johnson to sign releases.

The ASC affirmed.

The Court concluded that

- the information was relevant
- the state was entitled to it
- the entities wouldn't provide the records without releases
- ARCrP 15.2(g) authorized the court's order.

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State v. Johnson

Disclosure of counsels' notes

ARCrP 15.2(h)(1)(A)(ii) Additional Disclosures in a Capital Case—Initial Disclosures

- The defendant must disclose "the name and address of each person . . . the defendant intends to call as a witness during the aggravation and penalty hearings, and *any written or recorded statement of the witness.*"

When Johnson disclosed his mitigation witnesses, he provided only statement summaries.

The state argued that Johnson was required to turn over statements, not summaries.

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State v. Johnson

Disclosure of counsel's notes

Johnson opposed disclosure, arguing that they

- "were investigatory notes of the defense team,"
- "reflected counsel[s'] opinions, conclusions, and impressions,"
- were "inaccurate because they did not reflect verbatim statements,"
- were "only quick notes of [his counsels'] own impressions of the statements,"
- and might lead to a conflict "should counsel be called to verify the veracity of any statements."

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State v. Johnson

Disclosure of counsels' notes

The trial court ordered disclosure of recorded statements.

The court excluded counsels' opinions, theories, and conclusions.

Johnson could seek *in camera* review as necessary.

Johnson unsuccessfully sought special-action relief in the COA.

The ASC found no error.

Statements: discoverable under ARCrP 15.2(h).

Work product, generally protected under ARCrP 15.4(b).

The trial court's order allowed for redaction, *in camera* review.

Johnson failed to show that he had been prejudiced.

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State v. Mendoza, 248 Ariz. 6 (App. 2019)

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State v. Mendoza—background

- Mendoza charged with agg. DUI.
- Mendoza wanted "to discuss the case" with the court.
- The court informed Mendoza about the charges and the plea offer (9 years).
- The conversation turned to settlement discussions; no one acknowledged, or consented to, the change.
- The court opined about sentencing outcomes.
- Mendoza rejected the state's offer, was convicted; the same judge presided over Mendoza's trial and sentencing.
- The judge rejected the presentence report (10 years) and imposed a nearly 13-year prison term.

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State v. Mendoza

Compare issue to ARCrP 17.4(a)(2)

"[W]hether the superior court judge who ultimately presided over Mendoza's trial violated Rule 17.4(a)(2) by participating in the settlement discussions . . . without obtaining the consent of the parties and, if so, what remedy existed for a violation of the rule."

ARCrP 17.4(a)(2): "a court may order counsel with settlement authority to participate in good faith discussions to resolve the case . . . . The assigned trial judge may participate in this discussion only if the parties consent. In all other cases, the discussion must be before another judge. . . ."

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State v. Mendoza

COA found that:

- Mendoza didn't consent by asking for explanation of charges and plea offer
- trial court, not Mendoza, initiated settlement discussions
- error for judge to impose max sentence partially because Mendoza rejected plea offer
- sentence was likely the result of "judicial vindictiveness"
- *judicial vindictiveness* is a term of art, equating to legal error

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State v. Mendoza

"We do not presume the [trial court]'s intentions were improper, but the fact remains that [it] clearly and repeatedly departed from its critical role as a neutral arbiter by: (1) urging Mendoza to accept the plea offer to save him some time in his sentence and avoid a trial [it] indicated he had no chance of winning; and (2) promising to impose a sentence no lower than the presumptive sentence, 10 years, if Mendoza chose to go to trial."

Remedy: remand for resentencing before a different judge

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State v. Gentry,
247 Ariz. 381 (App. 2019)

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State v. Gentry

Case about *Batson* challenges during jury Selection.

In *Batson*, the Supreme Court held that the "Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury panel on account of race."

Batson v. Kentucky, 476 U.S. 79

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State v. Gentry

A Batson challenge is a three-part analysis:

1) The opponent of the strike must make a prima facie showing of racial discrimination.

2) If shown, the striking party must then provide a facially race-neutral basis for the strike.

3) If provided, the opponent must show the facially-neutral explanation is merely a pretext for purposeful discrimination.

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State v. Murray (*Easton*), 247 Ariz. 447 (2019)
State v. Murray (*Claudius*), 247 Ariz. 583 (2019)

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The Murray bros.—background

Two brothers asked the victim to store some marijuana for them.

When he refused, an argument and then a fight broke out.

Easton Murray tased the victim and urged his brother in Jamaican Patois to "shoot him, shoot the boy."

His brother shot the victim in the leg with a rifle.

Both brothers were charged with aggravated assault with a deadly weapon, tried jointly, and convicted.

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The Murray bros.

ARCrP 19.1(b) Conduct of Trial—Order of Proceedings

- **(2) the State may make an opening statement**
- **(4) the State must offer evidence in support of the charge**
- **(7) the parties may present arguments, with the State having an opening and a closing argument**

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The Murray bros.

General legal principles

- An appellate court does not lightly reverse a conviction due to prosecutorial misconduct.
- The court will reverse only where it's established that misconduct occurred, and there's a reasonable likelihood that the misconduct affected the jury's verdict, denying the defendant a fair trial.
- The court "view[s] a prosecutor's conduct within the context of the entire trial. . . . [But the court] will consider the cumulative effect of multiple instances of misconduct where the prosecutor engaged in persistent and pervasive misconduct and did so with indifference, if not a specific intent, to prejudice the defendant."

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The Murray bros.

The Murray bros. argued that the prosecutor had misrepresented the burden of proof.

In closing argument, the prosecutor had argued:

- So here is how to think when you might hear somebody say back there, well, I think one or both defendants *might be guilty* but I'm not sure it's beyond a reasonable doubt. Now, stop and ask yourself another question at that point. Why did I just say that? Why did I just say that I think the defendants *might be guilty*? You are a fair and impartial juror. If you are thinking that, *if you are saying that, is it not proof that you have been persuaded by the evidence in the case beyond a reasonable doubt*? Because why else would you say that were you not convinced by the State's evidence? So when you hear yourself say that, ask yourself the second question why, why do I think he is guilty? Because he is guilty because you have been convinced by the State's case beyond a reasonable doubt. That's why you think as you do being fair and impartial.

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The Murray bros.

COA: The prosecutor erred. *Might be* guilty ≠ guilty *beyond a reasonable doubt.*

But no prejudice:

- Prosecutor stated standard correctly other times.
- Court properly instructed jurors on BARD standard and about arguments of counsel.

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State v. Champagne, 247 Ariz. 116 (2019)

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State v. Champagne

Background

- Capital case
- Champagne killed two people in his apartment. He buried them in a wooden box in his mother's back yard, where a landscaper discovered them almost two years later.

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State v. Champagne

ARCrP 22.3(b): If, after the jury retires, the jury or a party requests additional instructions, the court may recall the jury to the courtroom and further instruct the jury as appropriate.

ARCrP 22.4: Many juries, after reporting to the judge that they have reached an impasse in their deliberations, are needlessly discharged and a mistrial declared even though it might be appropriate and helpful for the judge to offer some assistance in hopes of improving the chances of a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practically possible to do so. . . .

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State v. Champagne

Penalty-phase deliberations

- The jury asked for "a more detailed explanation of felony murder."
- The trial court gave each party five additional minutes to argue.
- The prosecutor went over the elements of felony murder, the relevant evidence, and the relevant jury instructions.
- The jury found Champagne guilty of premeditated and felony murder.

Before the ASC

- "Trial courts have inherent authority to assist juries . . . even when a jury is not at an impasse."
- "Doing so may prevent needlessly discharging juries and prematurely declaring mistrials . . . ."
- "[A] trial court should not order supplemental argument . . .unless the court concludes additional argument is the only way to adequately respond to the jury's request for additional instruction."

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State v. Rojas, 247 Ariz. 399 (App. 2019)

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State v. Rojas

Is a new trial warranted if extraneous information related to the case is received by the jurors during the trial? This case deals with ARCrP 24.1(c)(3)(A) and the Motion for a New Trial.

A Motion for New Trial is scrutinized with care because "meaningful review in such cases is required to maintain the integrity of the jury trial system and practical value of court adjudication." *Cal X-Tra v. W.V.S.V. Holdings, LLC*, 229 Ariz. 377 (App. 2012).

"On the other hand, we generally afford the trial court wide discretion in its decision to grant a new trial because of its intimate connection to the trial, including the opportunity to directly observe testimony." *Id.*

"We will not disturb an order granting a new trial unless the probative force of the evidence clearly demonstrates that the trial court's action is wrong and unjust and therefore unreasonable and a manifest abuse of discretion." *State v. Fischer*, 242 Ariz. 44 (2017).

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State v. Rojas

Once it is shown that extraneous information was received by the jury, the information is presumed to have caused prejudice, and the burden is on the state to show beyond a reasonable doubt that the extraneous information did not taint the verdict.

Factors to consider in that analysis:

- **whether the material was actually received;**
- **if so, how;**
- **the length of time it was available to the jury;**
- **the extent to which the jurors discussed and considered it;**
- **was it introduced before a verdict was reached, if so in what point in deliberations;**
- **any other matters which may bear on the issue of reasonable possibility of whether the extrinsic material affected the verdict.**

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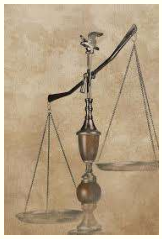
Questions?

The Honorable David Cutchen
Presiding Judge
Gilbert Municipal Court

Gary L. Shupe
Deputy Phoenix City Prosecutor



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